

CHAPTER VIII

HOUSING

Section 1. Failure to Rent Cases

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A. Legal Standards for Failure to Rent Cases

1. The Scope of This Section

This section discusses housing failure to rent cases under the FEHA. These are cases in which the complainant claims that the respondent denied or withheld housing accommodations from the complainant, and that the respondent did this because of the complainant's protected status (race, sex, ancestry, etc.). There are often multiple complainants in housing failure to rent cases.

- The failure to rent analysis discussed in this section is also applicable to failure to sell, lease, or to any other type of failure to "select" housing situation. It is also the same basic analysis used in employment "Selection Cases" (see Section 2 of Chapter VII).
- Although housing failure to rent (sell, lease, etc.) cases may include an outright denial of a housing accommodation, these cases frequently also include situations in which an owner or manager has not rejected the complainant outright but has instead discouraged the complainant from applying, refused to accept the complainant's application, or eliminated the complainant from equal consideration with other applicants (see relevant question A. on the failure to rent analytical outline). These acts of harm are violations in and of themselves for which there are separate remedies. In addition to the failure to rent (sell, lease) act of harm itself, then, other adverse actions typically found in housing cases for which there are separate remedies are:
 - o misrepresentation of availability
 - o unlawful inquiries
 - o statements of preference
 - o failure to show
 - o failure to allow complainant to apply
 - o selection process discrimination
- Housing failure to rent cases focus on Issue II. The respondent defends by claiming that its failure to select the complainant was not discriminatory to begin with, rather than by asserting some affirmative defense. The key question under Issue II is whether there was a "causal link" between the failure to rent (sell, lease, etc.) and the complainant's protected status.
- "Association" cases are also discussed in this section. These are cases in which the respondent takes an adverse action against the complainant (e.g., failure to rent, sell, lease, etc.) because the complainant associated with someone (e.g., a spouse, child, friend, etc.) who falls within a protected group. Association cases also focus on Issue II.
- Note that the housing section of the FEHA is different from the employment section in that it covers only seven protected bases: race, color, religion, sex, marital status, national origin, and ancestry. Age housing discrimination, however, is covered as "arbitrary" discrimination under the Unruh Civil Rights Act, as is physical handicap and blindness.

- The analyses for Unruh housing complaints which allege a form of "arbitrary" discrimination (e.g., age, sexual orientation, families with children, etc.) will be discussed in a separate reserved section (see "Unruh", Chapter IX). These complaints as well as Unruh non-housing complaints (e.g., restaurants, theaters, or any business establishment) on a named basis or as "arbitrary" discrimination are currently discussed in Directive 22.
- Government Code Section 12987 authorizes limited punitive damages for violations of Government Code Section 12955. Such awards are limited to \$1,000 plus an amount pegged to the California Consumer Price Index (CPI). As of July 1, 1991, housing punitive damage awards are \$1,474.00.

2. The Legal Standards

a. Failure to Rent (Sell, Lease) Cases

Failure to rent (sell, lease) cases focus on Issue II and use the same basic "causal link" legal standard as employment "standard" selection cases. If the complainant falls within a group protected by the FEHA, discrimination is shown if:

- 1) The respondent took some "adverse action" (e.g., failure to rent, sell, lease, etc.) against the complainant, and
- 2) A "causal connection" exists between the complainant's protected status and the adverse action.

In order to show the requisite "causal connection," the complainant's protected status need only be "a factor" or one of several factors influencing the respondent to take the adverse action. For a full discussion of the "causal link" standard, see "Discussion of the Legal Standard" in the "Selection Cases", Section 2 of Chapter VII).

Remember, in addition to complainants who fall within a group protected by FEHA, fair housing councils, individual "testers" or "checkers," and current tenants or residents of a community may also have standing to file a housing discrimination complaint.

b. Association Cases (Failure to Rent)

Housing "association" cases are those complaints in which the respondent takes an adverse action (often failure to rent) against the complainant because the complainant is associating with some other person who falls within a group (race, sex, ancestry, etc.) protected by the FEH Act.

The most typical failure to rent "association" case is based on race. In this type of case, the respondent is usually willing to rent to the complainant until it learns of the race (or other protected status) of the person with whom the complainant is associating. The other person may be a spouse, child, friend, roommate, or visitor.

Association cases use the same basic "causal link" legal standard under Issue II as failure to rent cases, with one difference. Instead of a causal connection between the adverse action and the complainant's protected status, association cases require that the causal link be shown between the respondent's adverse action and the complainant's associating with another person who falls within a protected group. Therefore, if it can be shown that the respondent failed to rent to the complainant because the complainant associated, for example, with a Black (or a person of any other protected group), the respondent will be liable under Issue II. The complainant's "association" need only be "a factor" in order to show the requisite causal link. In addition, the complainant does not actually have to be "associating" with a person of a protected group. If the respondent perceives that the

complainant is associating with such a person, that will be sufficient to meet the legal standard.

B. Analysis of Failure to Rent Cases

The analysis of failure to rent, (sell, lease, select) cases focuses on Issue II and is basically the same as the analysis of employment standard "selection" cases (see Section 2 of Chapter VII).

Since respondents rarely admit under Issue II that they were motivated by the protected status of the complainant, the Commission looks to various kinds of "indirect" evidence to prove the "causal link" legal standard. The following analytical outline, therefore, contains relevant questions representing the most typical kinds of evidence that may appear in failure to rent (sell, lease) cases. These questions are only a starting point for your own analysis. Each case is different and may well involve some of the questions below, or may require different questions altogether.

Remember, failure to rent, (sell, lease) cases typically and frequently involve additional acts of harm distinct from the failure to rent itself, such as misrepresentation of availability, unlawful inquiries, statements of preference, failure to show, failure to allow the complainant to apply, and selection process discrimination. Since these are separate adverse actions for which there are separate remedies, they should be analyzed separately, each one represented by its own Issue question and relevant questions. There is no need to repeat evidence if it has already been reported under previous relevant questions on the failure to rent analytical outline. Simply write the proper Issue and relevant questions and refer back to the relevant evidence.

1. Analytical Outline (Failure To Rent, Sell, Lease)

II. Discrimination

Did the respondent fail to rent (sell, lease, etc.) to the complainant because of the complainant's protected status (race, sex, etc.)?

Relevant Questions:

- A. Did the adverse action (failure to rent, sell, lease) actually happen?
 - 1. Did the respondent indicate in any way that the unit was available?
 - 2. Did the complainant indicate interest in the unit to the respondent?
 - 3. Did the respondent take any action to discourage, deny or otherwise "chill" the complainant?
- B. Is the respondent's reason(s) for the adverse action (failure to rent, sell, or lease) valid?

Qualifications Rebuttal

- 1. Is the respondent's claim that the complainant is less qualified than the person selected accurate?
- 2. How did the respondent apply the selection criteria to similarly situated applicants?

Other Rebuttals

- 1. Is the respondent's reason for not renting (selling, leasing) to the complainant factually accurate?
- 2. How did the respondent treat others who were similarly situated to the complainant?
- C. Does the respondent's application of its pre-selection procedures to similarly situated persons indicate that the failure to rent (sell, lease) occurred because of the complainant's protected status?
- D. Does the respondent's treatment of testers indicate that the failure to rent (sell, lease) occurred because of the complainant's protected status?
- E. Does the relevant statistical pattern indicate that the failure to rent (sell, lease) occurred because of the complainant's protected status?
- F. If the respondent has previously rented to the complainant's protected group, is there any evidence for a change in rental policy or of a quota?

- G. Is there any direct evidence to link the failure to rent (sell, lease) to the complainant's protected status?
- H. Is there any anecdotal evidence to link the failure to rent (sell, lease) to the complainant's protected status?
- I. Other relevant questions?

2. Additional Issue and Relevant Questions for Association
(Failure To Rent) Cases

The preceding analytical outline may also be used along with the questions below to analyze "association" failure to rent cases. Use the Issue question below, which focuses on the "association" legal standard, and add the following important relevant questions to the ones already on the failure to rent outline. In questions C-H, remember to change the phrase "because of the complainant's protected status" to "because of the complainant's association with a person of a protected group" (e.g., a person who is Black, Mexican, etc.). This will properly focus the question on the "association" legal standard.

II. Discrimination

Did the respondent fail to rent (sell, lease, etc.) to the complainant because of the complainant's association with a person of a protected group?

Relevant Questions (Add these to the failure to rent analytical outline)

- A. Did the respondent have knowledge or perceive that the complainant was associating with a person of a protected group?
- B. Does the timing of the adverse action (failure to rent, sell, lease) indicate that it occurred because of the complainant's association with a person of a protected group?
- C. Does the respondent's treatment of the complainant before and after the respondent learned of the complainant's "association" indicate that the adverse action (failure to rent, sell, lease) occurred because of the complainant's association with a person of a protected group?

C. The Law: Sources of the Legal Standards for Failure to Rent Cases

1. Statute

FEHA (Government Code) Sections 12927(a)-(e), 12955(a)-(g), 12956, 12986, 12987(remedy), and 12995(a)-(d).

2. Precedential Decisions

DFEH v. Bernice Terven (1980) FEHC Dec. No. 80-09. Race (Black) - failure to rent, misrepresentation of availability.

DFEH v. Victor and Helen Hess (1980) FEHC Dec. No. 80-10. Marital status (unmarried couple) - failure to rent [see published decision of the California Court of Appeals below].

DFEH v. Otto Neugebauer and Sadie Neugebauer (1980) FEHC Dec. No. 80-14. Marital status (unmarried female) - failure to rent.

DFEH v. Meir Somekh (1980) FEHC Dec. No. 80-15. Race (child who is recognizably Black) - failure to rent, offer to rent on inferior terms.

DFEH v. Atlantic North Apartments, Vicente Szeto, Clarice Szeto, Artman Yee, Carol Yee Owners, Rita Rouille, Manager (1983) FEHC Dec. No. 83-12. National origin (Iran) - failure to rent; retaliation for filing a DFEH complaint. Retaliation consisted of harassment; filing police report against Complainant.

DFEH v. Gwen-Bar, Inc. and Barney Karger, Owner (1983) FEHC Dec. No. 83-18. Race (Black) - failure to rent, statement of preference, quota.

DFEH v. Norman Green (Hollywood Wilshire Fair Housing Council) FEHC Dec. No. 86-07 [replaced FEHC Dec. No. 84-12]. Race (Black), national origin and ancestry (Hispanic) - misrepresentation of availability, unlawful inquiries, statements of preference, standing of fair housing council to file.

DFEH v. Davis Realty, Inc. - Marin and Sonoma (Porter, Snider, Porter and Kirtley) FEHC Dec. No. 87-02. Race (Black), race association (Black with Caucasian roommate), marital status (divorced, unmarried) - failure to rent, unlawful inquiries, statements of preference. Testimony of Complainants, expert psychologist and sociologist established high amounts of emotional injury damages.

DFEH v. Merribrook Apartments, James C. Beard, Owner, dba Beard Development Company and Beard and Hoshaw Investment Builders; Robert J. Hoshaw, Owner, dba Beard Development Company and Beard and Hoshaw Investment Builders; Ellen Reiley, Manager; Kay Smittle, Property Manager; Beard and Hoshaw Company, Inc.; and Beard Development Company (M. Tolmasov, D. Tolmasov, C. Tolmasov) FEHC Dec. No. 88-19. Age (minor child) - rent denial (two-bedroom apartment). Respondent maintained occupancy policy of one person per bedroom. Legal standard for establishing intentional discrimination under Unruh Act: preponderance of evidence shows that protected basis is "a factor" in the adverse action. FEHC incorporated doctrine of adverse impact as part of FEHA's prohibition of housing discrimination. Legal

standard for prevailing on adverse impact affirmative defense: 1) practice serves a compelling and well-established public purpose, and 2) there exists no reasonable alternative to serving the same need with less discriminatory impact. (BUT NOTE: In Harris v. Capital Growth Investors, 52 Cal.3d 1142 (1992), the California Supreme Court held that adverse impact analysis may not be used to show a violation of the Unruh Act. The Unruh Act prohibits intentional discrimination only. See Chapter IX, Unruh, Section C.)

DFEH v. Hallmark Realtors, Robert Dinkins and Charles Thomas (Esqueda) FEHC Precedential Order 91-A. National origin (Mexico) - statements of preference. Pursuant to Government Code Section 12948, DFEH housing discrimination complaints may be filed under the one-year statute of limitations of the Unruh Act. The FEHC rejected the respondent's argument that the sixty-day filing statute of limitations of Government Code Section 12955 controlled all DFEH housing discrimination complaints. (This FEHC Order considered the jurisdiction argument only; case remanded to the Administrative Law Judge for hearing on issues of fact.)

3. Court Decisions on Commission Cases

Victor Hess v. Fair Employment and Housing Commission (1982) 138 Cal.App.3d 232. Confirms the Fair Employment and Housing Commission's authority to award compensatory damages for emotional injury in housing cases. But see Walnut Creek Manor v. Fair Employment and Housing Commission below.

Walnut Creek Manor et al. v. Fair Employment and Housing Commission (1991) 54 Cal.3d 245. Race (Black) and marital status (single) - refusal to rent on 35 separate occasions. In a non-precedential decision, FEHC Dec. No. 87-07, the FEHC awarded out-of-pocket damages, \$50,000 in compensatory damages, and \$40,635 in punitive damages (calculated at \$1,000 for each of 35 rentals made to others while complainant's application was pending). On August 29, 1991, the California Supreme Court held that while Government Code Section 12987 authorizes the FEHC to award compensatory damages, an administrative award of unlimited general compensatory damages violates the judicial powers clause of the California Constitution (Supreme Court eliminated the \$50,000 compensatory damage award). The Supreme Court reduced the punitive damage award of \$40,635 to \$1,000, finding that Government Code Section 12987 authorizes only one punitive damage award for a course of conduct against the same individual on the same unlawful basis. The court upheld the FEHC's award of out-of-pocket expenses for increased rent and utilities, finding that such an award does not violate the judicial powers clause of the California Constitution.

4. Non-Commission Cases

Trafficante v. Metropolitan Life Insurance Co. (1972) 409 U.S. 205. Race - failure to rent to non-Whites, standing of current tenants of any race to file.

Havens Realty v. Coleman (1982) 455 U.S. 363. Race - misrepresentation of availability, racial steering, standing to file of fair housing groups, individual testers, and residents of the community.

APPENDIX A

HIGHLIGHTS OF DIFFERENCES BETWEEN STATE AND FEDERAL FAIR HOUSING LAWS

ENFORCING AGENCY	Title VIII of 1968 Civil Rights Act; 42 USC 8601	California Fair Employment and Housing Act (FEHA); Government Code Section 12955	California Unruh Civil Rights Act; Civil Code Section 51
	HUD	DFEH	DFEH
Coverage	Prohibits discrimination in the sale, rental, lease, or negotiations for real property based on: > Race > Color > Religion > Sex > National Origin > Familial Status > Handicap (includes mental disability, alcoholism, drug addiction not resulting from current abuse of controlled substances) Prohibits: > Intentional discrimination > Adverse Impact	Prohibits discrimination in the sale, rental, lease, negotiations or finance of real property based on: > Race > Color > Creed > Sex > National Origin > Ancestry > Marital Status Prohibits: > Intentional discrimination > Adverse Impact	Prohibits arbitrary discrimination by business establishments based on: > Race > Color > Religion > Sex > Ancestry > National Origin > Blindness > Physical Disability > Age/Children > Any arbitrary discrimination based on personal characteristics (excludes mental disability) Prohibits: Intentional discrimination <u>only</u>
Familial Status	Prohibits discrimination against families with children <u>Exceptions:</u> > Senior citizen housing	No coverage	Prohibits age discrimination which includes discrimination against children <u>Exceptions:</u> > Senior citizen housing > Mobilehome parks
Senior Citizen Housing	<u>Qualifying Requirements:</u> > Facility must show intention to house older people and have 100% of residents age 62 or older;	No coverage	<u>Qualifying Requirements:</u> > Facility must restrict occupants to persons age 62 or older; <u>OR</u>

|| OR ||
||
	> Facility must show	
	intention to house	
	older people and have	
	80% of units with one	
	person age 55 or older,	
	and provide	
	significant facilities	
	and services" for	
	seniors.	
	> No minimum number of	
	residents required.	

|| > Facility is a senior
|| citizen housing
|| development and restricts
|| occupancy to persons 55
|| or older and also:
||
|| ♦ Has 150 units in a
|| Standard Metropolitan
|| Statistical Area (SMSA)
|| or 35 units in other
|| areas; and
||
|| ♦ Is "developed for, or
|| substantially rehabili-
|| tated or renovated" to
|| meet the physical and
|| social needs of seniors.

	TITLE VIII	FEHA	UNRUH
Senior Citizen Housing (Continued)	<u>Significant Facilities and Services:</u> Includes physical accessibility, congregate dining rooms, social and recreational programs, information and counseling, emergency and preventive health care or programs, transportation services, etc. <u>Exceptions to Senior AGE Requirements:</u> <u>62 or Older</u> Persons under age 62 may reside in the complex <u>if</u> : > They resided there prior to September 13, 1988 and all <u>new</u> occupants after September 13, 1988 meet the age requirements; OR > They are <u>employees</u> of the housing complex who perform substantial duties directly related to management or maintenance (includes family members of such employees). <u>55 or Older</u> It is permissible that less than 80% of the units are occupied by tenants under age 55 <u>if</u> : > On September 13, 1988, less than 80% of the units were occupied by at least one person age 55 or older <u>and</u> at least 80% of the units occupied <u>after</u> September 13, 1988 are occupied by at least one person 55 years of	No coverage	<u>Substantial Renovation, Rehabilitation or Development:</u> (senior design requirements) Handrails, ramps, recreational facilities, wide sidewalks, specialized transportation, medical services, large bathrooms, provision for common rooms, etc. <u>Exceptions to Senior AGE Requirements:</u> > A person who is at least 45 years of age or is under the age of 45 and is a spouse, cohabitant, or person providing primary physical or economic support may reside <u>with</u> a senior as a "qualified permanent resident" if the person: ♦ Resided with a senior prior to the death, hospitalization, prolonged absence, or dissolution of marriage; AND ♦ Has an ownership interest or expectation of having an ownership interest, in dwelling unit. > A non-senior "qualified permanent resident" is entitled to <u>continue</u> his/her residency in the event of death, dissolution of marriage, hospitalization, or the prolonged absence of the senior resident. > A non-senior "permitted

health care resident" may
reside with a senior if
hired to provide live-in,
long-term, or terminal
health care.

➤ Non-senior residents may
continue to reside in
senior complexes provided
they were residents prior
to January 1, 1985.

	TITLE VIII	FEHA	UNRUH
Senior Citizen Housing (Continued)	<p><u>Exceptions to Senior AGE Requirements:</u> (Continued)</p> <p><u>55 or Older</u> (Continued)</p> <p>➤ The complex is newly constructed for first occupancy after March 12, 1989 and fewer than 25% of the units are occupied;</p> <p><u>OR</u></p> <p>➤ There are units occupied by employees of the housing complex who are under age 55 <u>provided</u> they perform substantial duties directly related to the management or maintenance of the housing.</p> <p><u>Exceptions to Provision of Significant FACILITIES and SERVICES:</u></p> <p>Senior complexes housing persons 55 or older are exempt from having significant facilities and services specifically designed for seniors <u>if</u>:</p> <p>➤ It is not practicable to provide such services;</p> <p><u>AND</u></p> <p>➤ The housing facility is necessary to provide important housing opportunities for older persons (housing provider must show that provision of such services would result in depriving older persons in relevant geographic area of needed and desired housing).</p>		<p>➤ Non-senior residents may continue to reside in "senior citizen housing developments" exempt from the senior design requirements per Civil Code Section 51.4, <u>provided</u> they were residents as of January 1, 1990.</p> <p><u>Exceptions to Senior DESIGN Requirements:</u></p> <p>Senior housing developments (55 or over) are exempt from senior design requirements until January 1, 2000 <u>if</u> they:</p> <p>➤ Were constructed prior to February 8, 1982;</p> <p>➤ Can show that it is not practical to meet senior requirements in the areas in which they are located;</p> <p>➤ Can show that the housing development is necessary to provide housing opportunities to seniors.</p>

Mobilehome Parks	Prohibits familial status discrimination in mobile-home parks	No coverage	Mobilehome Residency Act (Civil Code Section 798.76) permits parks to establish "adults only" facilities (18 years of age or older)
Handicap	Encompasses physical and mental disability; includes alcoholism and drug addiction	No coverage	Encompasses only <u>physical</u> handicap

	TITLE VIII	FEHA	UNRUH
Handicap (Continued)	<u>Reasonable Accommodation:</u> > Requires housing provider to reasonably accommodate by permitting physical alteration of premises if there is reasonable assurance premises will be restored to original status at end of tenancy.		<u>Reasonable Accommodation:</u> > Specifically exempts housing providers from accommodation requirements
Filing Requirements	<u>With HUD</u> File within one year of discriminatory act. <u>Civil Court Suit by Individual</u> File lawsuit within two years (no prerequisite of filing with HUD).	<u>With DFEH</u> File within 60 days of discriminatory act. <u>Civil Court Suit by Individual</u> File lawsuit within one year of receiving right to sue (must file with DFEH as prerequisite to court action).	<u>With DFEH</u> File within one year of discriminatory act. <u>Civil Court Suit by Individual</u> File lawsuit within three years (no prerequisite of filing first with DFEH).
Processing	<u>HUD Investigation</u> Concludes within 100 days ↓ <u>Litigation Forum</u> Complainant or respondent elects: > HUD administrative hearing before Administrative Law Judge OR > Suit in federal district court with complainant represented by Department of Justice attorneys	<u>DFEH Investigation</u> Concludes within one year ↓ <u>Litigation Forum</u> DFEH attorneys litigate case in administrative hearing before Administrative Law Judge and Fair Employment and Housing Commission renders final decision.	<u>DFEH Investigation</u> Concludes within one year ↓ <u>Litigation Forum</u> DFEH attorneys litigate case in administrative hearing before Administrative Law Judge and Fair Employment and Housing Commission renders final decision.
Remedies	<u>HUD</u>	<u>DFEH/FEHC</u>	<u>DFEH/FEHC</u>

> Actual damages (including pain and suffering) > Injunctive relief > Equitable relief > Penalties between \$10,000 and \$50,000 > Attorney's fees and costs <u>Court</u> > Actual and punitive damages > Injunctive and equitable relief > Attorney's fees 	> Actual damages (including limited damages for pain and suffering) > Punitive damages of \$1,000 per violation > Injunctive relief > Equitable relief <u>Court</u> > Unlimited actual and punitive damages > Injunctive and equitable relief > Attorney's fees 	> Injunctive and equitable relief > A legal question exists as to monetary damages <u>Court</u> > Actual damages > punitive damages up to three times actuals > Injunctive and equitable relief > Attorney's fees
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